Office-Supreme Court, U.S.
FILED
FEB 18 1965
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 918

SUNSET REALTY CORP.,
*Petitioner,*

*v.*

TAX ASSESSOR, TAX COLLECTOR, BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, and COMPTROLLER OF THE STATE OF FLORIDA,
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA.**

THOMAS P. FORD
ARTHUR NORMAN FIELD
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New York, New York 10005

# INDEX


PAGE

Opinions below ---- 2

Jurisdiction ---- 2

Question presented ---- 3

Constitutional provision ---- 3

Statement ---- 4

Reasons for granting the writ

First Reason ---- 8

Second Reason ---- 14

Third Reason ---- 16

Conclusion ---- 16

Appendix A—Opinions and judgment below

Appendix B—Excerpts from record

Appendix C—Opinions in certain Florida cases

Appendix D—Motion to amend and order


## CITATIONS

*Cases:*


*Sioux City Bridge Company* v. *Dakota County, Nebraska*, 260 U. S. 441 (1923) ---- 8, 9, 10, 13, 14, 15

*Township of Hillsborough* v. *Cromwell*, 326 U. S. 620 (1945) ---- 8, 10, 13, 15

*Cosen Inv. Co. Inc.* v. *Overstreet, Tax Collector, et al.*, 17 So. 2d 788 (Fla. Sup. Ct. 1944) ---- 11, 12

PAGE

*Sproul, et al.*, v. *Royal Palm Yacht & Country Club Inc.*, 143 So. 2d 900 (2d Dist. C. A. Fla. 1962) ---------- 11, 12

*Rollman & Sons Co.* v. *Board of Revision*, 163 Ohio St. 363, 127 NE 2d 1 (1955) ------ 15

*Statutes:*

Rule 1.15 (b) Florida Rules of Civil Procedure 14

*Miscellaneous:*

Note, *Assessment Standards and Property Tax Equity in Florida*, 17 U. Fla. L. Rev. 83 (1964) ---------- 12

Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 Harv. L. Rev. 1374 (1962) ---------- 15

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*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA.

Petitioner prays that writs of certiorari issue to review the decrees of the District Court of Appeal, Second District of the State of Florida filed on June 10, 1964 in the above cases entitled *Sunset Realty Corp. v. Dawson McDaniel, Tax Collector of Lee County, Florida; Harry Schooley, Tax Assessor of Lee County, Florida; George S. Hunter, Herman J. Hastings, Mack H. Jones, J. Fred Huber, Julian L. Hudson, as Members of the Board of County Commissioners of Lee County, Florida; and Ray E. Green, Comptroller of the State*

*of Florida* (Appeal No. 4371), and *Sunset Realty Corp. v. Harry Schooley, Tax Assessor of Lee County, Florida; Dawson McDaniel, Tax Collector of Lee County, Florida; George S. Hunter, Herman J. Hastings, Mack H. Jones, J. Fred Huber, Julian L. Hudson, as Members of the Board of County Commissioners of Lee County, Florida; and Ray E. Green, Comptroller of the State of Florida* (Appeal No. 4372).* Identical questions are involved in the two cases. Both cases were decided in one opinion of the trial court. Accordingly, this single petition covering both cases is filed pursuant to Rule 23(5) of the Revised Rules of this Court.

**Opinions Below**

The opinion of the trial court, The Circuit Court of Lee County, Florida (R. 171-172), which relates to both cases, is unreported and is printed in Appendix A hereto, *infra*, pp. A-1–2. The opinions of the District Court of Appeal, Second District of the State of Florida (R. 179-181 and R. 251-252), printed in Appendix A hereto, *infra*, pp. A-3–5 and 6–7, are reported at 165 So. 2d 782 and 165 So. 2d 783. The Supreme Court of Florida declined to review on appeal or certiorari and rendered no opinion in these cases.

**Jurisdiction**

The decrees of the District Court of Appeal, Second District of the State of Florida, were entered on June 10, 1964. (R. 179 and R. 251). Rehearing of both decrees was denied on July 15, 1964. (R. 191 and R. 260).

* All of the respondents are public officers in their official capacity. They are described herein by their official titles pursuant to Rule 48(4) of the Revised Rules of this Court.

Notices of Appeal (R. 211-212 and R. 280-281) and Petitions for Certiorari (R. 194-201 and R. 263-270) were filed in both cases in the Supreme Court of Florida. Certiorari was denied in both cases on October 30, 1964. (R. 203 and R. 272). Petitions for rehearing of the petitions for certiorari in both cases were filed on November 12, 1964 (R. 204-207 and R. 273-276) and denied on December 7, 1964. (R. 209 and R. 278). Thereafter, motions to dismiss the appeals for lack of jurisdiction were granted on December 22, 1964. (R. 222 and R. 291). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

**Question Presented**

Whether a state court's failure or refusal to consider evidence of intentional systematic undervaluation by state officials of taxable property of the same class and kind as Petitioner's, in the absence of proof of valuation of Petitioner's property in excess of full cash value, violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

**Constitutional Provision**

The constitutional provision involved is the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The second sentence of Section 1 of the Fourteenth Amendment is set out verbatim below, with the equal protection clause shown in italics.

> "No state shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*"

**Statement**

In 1946 Petitioner, a Florida corporation, acquired certain property on Gasparilla Island in Lee County and in Charlotte County, Florida. This Petition arises out of the 1961 and 1962 Florida ad valorem taxes levied with respect to approximately 277 acres of the unplatted portion of such property in Lee County so acquired by Petitioner.

The 1960 assessment for these 277 acres was $159,160, substantially unchanged from prior years. The 1961 assessment of these same lands was $908,360. The assessment of the two most important parcels of this land was increased from $84,610 in 1960 to $833,810 in 1961. (R. 8, 11).

No improvements were made on Petitioner's land during the year prior to the 1961 assessment. The land had never been improved and remains entirely unimproved to this day. No general revaluation of property took place in the County in connection with the 1961 assessment and there was substantially no change in the tax rate. The situation in 1962 was the same as in 1961. (R. 229, 232).

Petitioner timely filed separate actions (R. 5-12 and R. 226-232) against the Respondents in the Circuit Court of Lee County, Florida seeking relief from the 1961 and 1962 taxes. By stipulation of the parties, which was adopted by the trial court (R. 241), the

result of the 1961 case was made to govern the 1962 case since the issues in both cases were identical. (R. 239-240).

In the complaints (R. 5-12 and R. 226-232)* it was alleged that (1) Petitioner's property had been assessed in excess of full cash value, and that (2) Petitioner had been discriminated against in the overassessment of its property relative to property of the same class and kind similarly situated and utilized in Lee County. Substantial proof was submitted at trial on both of these issues.

The opinion of the trial court, printed in full in Appendix A, *infra*, pp. A-1-2, stated only that:

> "I find: (a) That . . . plaintiff's lands were not assessed in excess of the full cash value thereof; and (b) That the equities . . . are with the defendants and against the plaintiff;"

There was nothing in the opinion to indicate whether the issue of discrimination had been considered. However, immediately prior to rendering the above opinion, the trial court, in denying a motion to amend the complaint to conform to the evidence (R. 168-169 and R. 170) stated:

> "To grant said Motion would change the entire style of the case and call for a different type of action than the suit originally filed whether by mandamus or other proceedings;"

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* The 1961 complaint is printed in Appendix B hereto, *infra*, pp. B-1-9. It is in all material respects identical to the 1962 complaint except for the omission in the 1962 complaint of the matter contained in paragraph 5 of the 1961 complaint.

The opinion of the District Court of Appeal, Appendix A, *infra,* pp. A-3–5, explained the trial court's opinion as follows:

> "The Court, in effect, found that plaintiff had failed to sustain the burden of proof laid upon it of establishing that the property was assessed in excess of full cash value; thus it was not entitled to injunctive relief because of alleged unlawful discrimination."

While the District Court of Appeal opinion discusses only the denial of injunctive relief, Petitioner requested injunctive as well as various other kinds of relief in the complaints (R. 5-12 and R. 226-232). Appendix B, *infra,* pp. B-1–9. All relief was denied.

The trial court refused to consider Petitioner's proof as to discrimination on the ground that Petitioner did not establish assessment in excess of full cash value. This refusal is the crux of Petitioner's case herein.

Petitioner's appeals to the Florida appellate courts were unavailing.

The federal question sought to be reviewed, namely, whether Petitioner has been denied the equal protection of the laws by the failure or refusal of the Florida courts to consider evidence of intentional systematic undervaluation of property similar to Petitioner's in the absence of proof of assessment of Petitioner's property in excess of full cash value, was raised in the court of first instance, in the complaints (R. 5-12 and R. 226-232), particularly, but without limitation, in paragraphs 8 and 9 of the complaint in the 1961 case (R. 8) and paragraphs 7 and 8 of the com-

plaint in the 1962 case (R. 228). The 1961 complaint is printed in full in Appendix B hereto, *infra,* pp. B-1–9.* In the District Court of Appeal of Florida, Second District, the federal question sought to be reviewed was raised in the Assignment of Errors (R. 175-178 and R. 246-250), particularly, but without limitation, in paragraphs 8, 9, 10 and 11 of the Assignment (R. 177-178) in the 1961 case and 10, 11, 12 and 13 of the Assignment (R. 248-249) in the 1962 case. The 1962 case Assignment of Errors is printed in full in Appendix B hereto, *infra,* pp. B-10–14.** The federal question sought to be reviewed was again raised in the District Court of Appeal in petitions for rehearing on both cases (R. 182-190 and R. 253-254), particularly in paragraph 4 of the petition for rehearing in the 1961 case (R. 188-189). The substantive matters contained in the 1961 case petition for rehearing were made applicable to the 1962 case by the petition for rehearing in the 1962 case. (R. 253). Paragraph 4 of the petition for rehearing in the 1961 case is printed in Appendix B hereto, *infra,* pp. B-15–16. In the Supreme Court of Florida the federal question sought to be reviewed was raised (a) in the appeals by the Assignment of Errors in both cases (R. 214-217 and R. 283-286), particularly, but without limitation, in assignments 3, 4, 11, 13 and 14 and (b) in certiorari by the petitions therefor (R. 194-201 and R. 263-270), particularly, but without

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* The 1961 complaint is in all material respects identical to the 1962 complaint except for the omission in the 1962 complaint of the matter contained in paragraph 5 of the 1961 complaint.

** The 1962 case Assignment of Errors is in all material respects identical to the 1961 case Assignment of Errors except that the 1961 case Assignment of Errors omits the matter contained in paragraphs 2 and 3 of the 1962 case Assignment of Errors.

limitation, in paragraphs 5 and 6 (R. 198-200 and R. 267-269). The Assignment of Errors in the 1961 case and paragraphs 5 and 6 of the Petition for Certiorari in the 1961 case are printed in Appendix B hereto, *infra,* pp. B-22–27 and 17–21.* The federal question sought to be reviewed was again raised in the Supreme Court of Florida in petitions for rehearing of the denial of the petition for certiorari in that court (R. 205-207 and R. 274-276), particularly, but without limitation, in paragraph 2 of each petition for rehearing (R. 205-206 and R. 274-275). The petition for rehearing in the 1961 case is printed in full in Appendix B hereto, *infra,* pp. B-28–32.**

## REASONS FOR GRANTING THE WRIT

### First Reason

**The decisions of the Florida courts in this case are directly in conflict with the equal protection requirements set down by this Court.**

This Court's decisions in *Sioux City Bridge Company* v. *Dakota County, Nebraska,* 260 U. S. 441 (1923) and *Township of Hillsborough* v. *Cromwell,* 326 U. S. 620 (1945) forbid intentional unequal assessment of similar properties and entitle a taxpayer who has proved such discrimination to a reduction to the level at which comparable parcels are assessed.

* The Assignment of Errors in the 1961 case and paragraphs 5 and 6 of the 1961 Petition for Certiorari are in all material respects identical to similarly numbered paragraphs of the Assignment of Errors and the Petition for Certiorari in the 1962 case.

** The petition for rehearing in the 1961 case is in all material respects identical to the petition for rehearing in the 1962 case.

In the *Sioux City Bridge* case this Court held that a state court failure to consider the issue of discrimination violated the requirements of the equal protection clause because proof of such discrimination might entitle the taxpayer to a reduction in his assessment. This Court (at 260 U. S. 445, 446) stated that:

> "[I]t must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property."
>
> * * * * *
>
> "This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute."

A comparison of the case at bar with the *Sioux City Bridge* case discloses a compelling parallel. In both cases county real estate tax assessments were involved (R. 6 and 260 U. S. at 442); the taxpayer brought an action in the local state court, raising both the issues of assessment in excess of full value and discrimination (R. 6, 8 and 260 U. S. at 443); the taxpayer was unable to establish assessment in excess of full value and the trial court held for the defendants (R. 172 and 260 U. S. at 443); and the trial court made no finding on the issue of discrimination and did not even refer to the issue in its opinion (R. 171-172 and 260 U. S. 443). On appeal both cases were affirmed upon the basis that there was no abuse of discretion shown (R. 180-181 and 260 U. S. 443).

Certiorari was granted by this Court in the *Sioux City Bridge* case. This Court reversed and remanded because the courts of the State of Nebraska had refused to consider the issue of discrimination. In reversing and remanding this Court did not there attempt to determine whether, in fact, there had been discrimination violative of the equal protection clause. The refusal to consider the question of discrimination required the reversal.

The Florida courts in this case have taken precisely the position taken by the Nebraska courts in the *Sioux City Bridge* case and which this Court found to be reversible error.

In the more recent *Hillsborough* case, 326 U. S. 620 (1945), the taxpayer sought relief in the Federal courts from discriminatory assessment of a township personal property tax because no relief, other than mandamus, was available in the New Jersey state courts. This Court affirmed the decree of a federal district court voiding the tax assessment, citing the *Sioux City Bridge* case, and stating (at 326 U. S. at 623, 624):

> "The constitutional requirement . . . is not satisfied if a state does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. . . . The courts of New Jersey in a long line of decisions have held that a taxpayer who has been singled out for discriminatory taxation may not obtain equalization by reduction of his own assessment. His remedy is restricted to proceedings against other members of his class for the purpose of having their taxes increased."

This Court went on to conclude, after considering the decisions of the New Jersey courts in cases raising the same issue, that "the state remedy is not adequate to protect respondent's rights under the federal Constitution." (326 U. S. at 624)

While no case or statutory authority was cited in either the opinion of the trial court or in the opinions of the District Court of Appeal in the case at bar, it has long been the rule in Florida that its courts will provide no relief, in the absence of assessment in excess of full value, upon a claim of discriminatory assessment, except perhaps by mandamus. *Cosen Inv. Co. Inc.* v. *Overstreet, Tax Collector, et al.,* 17 So. 2d 788 (Fla. Sup. Ct. 1944); *Sproul, et al.,* v. *Royal Palm Yacht & Country Club Inc.* 143 So. 2d 900 (2d Dist. C. A. Fla. 1962)*

In the first of these two cases, the *Cosen* case, the Florida Supreme Court held that a taxpayer could not enjoin collection of a portion of an assessment against his property on the ground that it had been assessed at 100 per cent of its value, even if it was assumed that other nearby property was assessed at 75 per cent of value. The Florida Supreme Court stated (at 17 So. 2d 788) that:

> "To grant appellant's request would require us to order a constitutional, official act contrary to the statute"

In the *Sproul* case, the Second District Court of Appeals of Florida (at 143 So. 2d 900) faced the issue squarely:

> "[P]laintiff alleged that . . . property in the county similar to its property were assessed at a

* Both opinions are printed in full in Appendix D, *infra,* pp. D-1–3, 4–6.

> much lower valuation but nowhere . . . alleged that its property is assessed in excess of its actual cash value."
>
> * * * * *
>
> "The particular point presented . . . is whether or not the complaint states a cause of action for injunctive relief in a challenge to the real estate assessment . . . when it fails to allege that such assessment is in excess of full cash value of the property".

The District Court of Appeals held that no cause of action was stated, on the authority of the *Cosen* case and an earlier Florida case.

Although it may be argued that the allegations in the *Cosen* and *Sproul* cases failed to raise the question of systematic undervaluation,* it is clear that these cases are not read by the Florida courts to apply only in the absence of allegations of systematic undervaluation. They have been read to state a general rule applicable even in the case of systematic undervaluation.

For example, a recent University of Florida Law Review Note, *Assessment Standards and Property Tax Equity in Florida,* 17 U. Fla. L. Rev. 83 (1964), in referring to the *Sproul* case stated (at 17 U. Fla. L. Rev. 93, 95) that:

> "The Second District Court of Appeal recently reiterated the notion that a taxpayer who has been discriminated against by having his property assessed at the statutory full cash value while other property was assessed at a lower level could not get relief by having his assessment lowered. . . . [T]he

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* The opinions in these cases recite only allegations of higher assessment by comparison with a single other property or a small group of other properties.

court held that the trial judge should have granted a motion to dismiss on the ground that a complaint failing to allege that assessments were in excess of the actual full cash value of the property does not state a cause of action for injunctive relief against a tax assessment."

* * * * *

"[T]he thrust of the *Sioux City Bridge* case seems clearly against the course of opinion in Florida."

In the case at bar intentional systematic underassessment of others similarly situated was alleged in the complaints. (R. 5-12 and R. 226-232), Appendix B, *infra,* pp. B-1–9.

There is no question that the trial court in the case at bar applied the rule of the foregoing Florida decisions, which rule, as applied to this case, is clearly in conflict with this Court's holdings in the *Sioux City Bridge* and *Hillsborough* cases.

The denial by the trial court of Petitioner's motion to amend its Complaint in the 1961 case to conform to the evidence, indicates that, regardless of allegations of intentional systematic underassessment, the court would not consider evidence of discrimination if Petitioner could not prove assessment in excess of cash value, except perhaps in a mandamus proceeding. This is made clear in the court's order (R. 170) denying the motion:

"1. To grant said Motion would change the entire style of the case and call for a different type of action than the suit originally filed whether by mandamus or other proceedings."

* * * * *

"3. Testimony and exhibits introduced at the trial of the cause of action failed to show that plaintiff's lands were assessed in excess of one hundred per cent of full cash value thereof."

This order* had the effect of striking all Petitioner's allegations of discrimination from the complaints.

From both the opinions of the trial court and the District Court of Appeals (Appendix A, *infra*, pp. A-1-2, 3-5 and 6-7), it is clear that the failure of Petitioner to establish assessment in excess of full cash value foreclosed consideration of all allegations of discrimination. Therefore, it is submitted that, in this case, and in all similar cases, the Florida courts fail to afford Petitioner and parties similarly situated the equal protection of the laws.

### Second Reason

**The issue involved is one which concerns the taxpayers of Florida generally and the taxpayers of other states as well.**

As a practical matter, taxpayers generally, who have a complaint about their assessment, are concerned about the issue in this case—the duty of the courts to hear evidence of discrimination in assessment. Florida is not alone in failing to heed the *Sioux*

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* This denial could not have been based on any grounds of prejudice to the defendants. There could have been no such prejudice because the motion to amend was made after testimony by all parties had been presented. The record discloses no claim of prejudice. The Florida Rules of Civil Procedure, Rule 1.15(b) concerning amendments to conform to the evidence is substantially the same as Federal Rules of Civil Procedure 15(b).

The Motion and Order are printed in Appendix C, *infra*, pp. C-1-2 and 3-4.

*City Bridge* and *Hillsborough* cases. See e. g., *Rollman & Sons Co.* v. *Board of Revision,* 163 Ohio St. 363, 127 N. E. 2d 1 (1955).

A recent Note in the Harvard Law Review, *Inequality in Property Tax Assessments: New Cures for an Old Ill,* 75 Harv. L. Rev. 1374 (1962), considered the Fourteenth Amendment requirement of equality in assessment. It referred to the situation of taxpayers generally, who try to establish that assessments are too high (75 Harv. L. Rev. at 1375):

> "There are two principal grounds on which such a complaint may be based. The first is overvaluation: the taxpayer may argue that his property, considered alone, has been valued at more than it is actually worth in terms of the statutory standard of "full," "true," "market," "fair cash," or "ordinary" value. Although this argument is widely relied on in the many thousands of assessment protests filed annually throughout the country, it is undercut in many localities by the assessors' practice of valuing property at only a fraction of the full-value standard. The second ground is inequality: the taxpayer may argue that his property has been assessed at a higher percentage of its value than other property which the law requires to be assessed at an equal percentage. This argument, going directly to the issue of inequitable allocation of the tax burden, is legally the more significant; it can rely not only on state law, but also on the equal protection clause of the fourteenth amendment."

A reaffirmation by this Court of the equal protection requirements established in the *Sioux City Bridge* and *Hillsborough* cases now would appear to be of public importance.

### THIRD REASON

**The issue involved here is an annually recurring one for petitioner.**

A failure to grant this Petition will enable the taxing authorities to continue to impose an unconstitutional and unconscionable tax burden on Petitioner so long as it holds the property involved.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS P. FORD

ARTHUR NORMAN FIELD
*Counsel for Petitioner*

February 18, 1965.

## Appendix A

IN THE
CIRCUIT COURT OF LEE COUNTY, FLORIDA.
IN CHANCERY

| | |
|---|---|
| SUNSET REALTY CORP., a Florida corporation, *Plaintiff*, *vs.* DAWSON MCDANIEL, Tax Collector of Lee County, Florida, et al., *Defendants*, and SUNSET REALTY CORP., a Florida corporation, *Plaintiff*, *vs.* HARRY SCHOOLEY, Tax Assessor of Lee County, Florida, et al., *Defendants*. | CHANCERY CASE No. 14610<br>CHANCERY CASE No. 15340 |

### FINAL DECREE

The plaintiff filed suit against the Tax Collector of Lee County, Florida, and others, attacking the validity of the Lee County, Florida ad valorem taxes levied against plaintiff's land for the year 1961, being Chancery Case No. 14610; and thereafter plaintiff filed a like suit against Harry Schooley, Tax Assessor of Lee County, Florida, et al., with respect to the 1962 ad valorem taxes levied against its land, being Chancery Case No. 15340. Upon stipulation of all of the parties to said Chancery Case No. 15340 that the issues of both cases were essentially the same, it was agreed that Chancery Case No. 15340 should be bound by the ruling of the Court in Chancery Case No. 14610, which was understood to mean the final determination of the cause.

this stipulation upon the basis of essentially the same facts in the previous trial of Chancery Case No. 14610 before this Court and any actual trial of Chancery Case No. 15340 would be a duplication of the previous case. Chancery Case No. 14610 was set down before me for trial and I personally heard the testimony adduced by the parties and I examined and reviewed the documentary evidence and exhibits admitted in evidence and, after consideration thereof, I find: (a) That for the year 1961 plaintiff's lands were not assessed in excess of the full cash value thereof; and (b) That the equities in Chancery Case No. 14610 are with the defendants and against the plaintiff; (c) That as per stipulation between all of the parties to said cause that for the year 1962 the plaintiff's lands were not assessed in excess of the full cash value thereof; and (d) That the equities in said Chancery Case No. 15340 are with the defendants and against the plaintiff.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Complaint in each such case is hereby dismissed, with prejudice and at the cost of the plaintiff.

DONE AND ORDERED this 21st day of June, 1963.

ARCHIE M. ODOM
*Circuit Judge*

STATE OF FLORIDA, COUNTY OF LEE
FILED FOR RECORD

This 21 day of June 1963 Record in OR Book 197 Page 74 and Record verified D. T. Farabee, Clerk Circuit Court.

BY ENID EARLE
*Deputy Clerk*

[SEAL]

*Appendix A*

IN THE
# DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

January Term, A. D. 1964

| | |
|---|---|
| SUNSET REALTY CORP., a Florida corporation, *Appellant*, v. DAWSON McDANIEL, Tax Collector of Lee County, Florida, HARRY SCHOOLEY, Tax Assessor of Lee County, Florida; GEORGE S. HUNTER, HERMAN J. HASTINGS, MACK H. JONES, J. FRED HUBER, JULIAN L. HUDSON, as Members of the Board of County Commissioners of Lee County, Florida; and RAY E. GREEN, Comptroller of the State of Florida, *Appellees*. | CASE No. 4371 |

Opinion filed June 10, 1964.

Appeal from the Circuit Court for Lee County; Archie M. Odom, Judge.

Earl Drayton Farr, Jr., of Farr, Farr and Haymans, Punta Gorda, for Appellant.

Frank A. Pavese of Pavese & Waldorf and K. W. Shaughnessy, Fort Myers, for Appellees.

ELMORE, FRANK H., ASSOCIATE JUDGE.

The plaintiff, appellant here, by its complaint, sought injunctive relief to restrain the defendants,

appellees here, from collecting taxes assessed against certain of its lands in Lee County for the year of 1961 and to set aside so much of the tax assessments for that year as exceeded alleged full cash value.

After the evidence had been adduced, and before adjudication, plaintiff moved to amend its complaint to conform to the evidence. The court, after argument, denied the motion* and entered a final decree dismissing the complaint upon findings that plaintiff's lands were not assessed in excess of the full cash value and that the equities were with the defendants and against the plaintiff.

The Court, in effect, found that plaintiff had failed to sustain the burden of proof laid upon it of establishing that the property was assessed in excess of full cash value; thus it was not entitled to injunctive relief because of alleged unlawful discrimination.

The decree of the trial court is generally presumed to be correct on appeal. This court is not authorized to interfere with the judgment of the trial court unless there is no substantial evidence to support the judgment.

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* The Court gave these reasons for denying the motion:

"1. To grant said Motion would change the entire style of the case and call for a different type of action than the suit originally filed whether by mandamus or other proceedings;

"2. To grant said Motion would test the Tax Assessor's authority to assess developing subdivisions at a developer's discount on acreage basis, thereby placing the entire tax rolls of Lee County, Florida . . . in question . . .

"3. Testimony and exhibits introduced at the trial of the cause of action failed to show that plaintiff's lands were assessed in excess of one hundred per cent of full cash value."

*Appendix A*

It is unnecessary to recite or summarize the evidence contained in the record. Appellant admits that none of the facts in this case is in dispute. Our review does not disclose that the learned chancellor misapprehended the legal effect of the evidence or that he applied incorrect principles of law to the facts. There was competent, substantial evidence to support his conclusions. Therefore, the decree will be affirmed.

Affirmed.

SHANNON, A. C. J., and WHITE J., CONCUR.

*Appendix A*

IN THE

# DISTRICT COURT OF APPEAL OF FLORIDA

SECOND DISTRICT

January Term, A. D. 1964

| | |
|---|---|
| SUNSET REALTY CORP., a Florida corporation, *Appellant*, v. HARRY SCHOOLEY, Tax Assessor of Lee County, Florida; DAWSON MCDANIEL, Tax Collector of Lee County, Florida; GEORGE S. HUNTER, HERMAN J. HASTINGS, MACK H. JONES, J. FRED HUBER, JULIAN L. HUDSON, as Members of the Board of County Commissioners of Lee County, Florida; and RAY E. GREEN, Comptroller of the State of Florida, *Appellees*. | CASE NO. 4372 |

Opinion filed June 10, 1964.

Appeal from the Circuit Court for Lee County; Archie M. Odom, Judge.

Earl Drayton Farr, Jr., of Farr, Farr and Haymans, Punta Gorda, for Appellant.

Frank A. Pavese of Pavese & Waldorf and R. W. Shaughnessy, Fort Myers, for Appellees.

PER CURIAM.

This case involves the identical parties and issues of those embraced by Case No. 4371, decided this date.

The only distinction is that that case concerns assessments and taxes for the year of 1961 and this case for the year of 1962.

Attorneys of record for the parties have stipulated that this case shall be bound by the ruling in Case No. 4371, which was adopted by the trial court. Therefore, upon that authority, the decree in this case is affirmed.

**Affirmed.**

SHANNON, A.C.J., and WHITE, J., and ELMORE, FRANK H., ASSOCIATE JUDGE, CONCUR.

**Appendix B**

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA.

IN CHANCERY.

| | |
|---|---|
| SUNSET REALTY CORP., a Florida corporation, *Plaintiff* *vs* DAWSON MCDANIEL, Tax Collector of Lee County, Florida; HARRY SCHOOLEY, Tax Assessor of Lee County, Florida; GEORGE S. HUNTER, HERMAN J. HASTINGS, MACK H. JONES, J. FRED HUBER, JULIAN L. HUDSON, as Members of the Board of County Commissioners of Lee County, Florida; and RAY E. GREEN, Comptroller of the State of Florida, *Defendants* | No. 14610 |

## COMPLAINT

Comes now the Plaintiff, SUNSET REALTY CORP., a Florida corporation, by and through its undersigned attorneys, and files this its Complaint against Dawson McDaniel, Tax Collector of Lee County, Florida; HARRY SCHOOLEY, Tax Assessor of Lee County, Florida; GEORGE S. HUNTER, HERMAN J. HASTINGS, MACK H.

JONES, J. FRED HUBER and JULIAN L. HUDSON, as Members of the Board of County Commissioners of Lee County, Florida, and RAY E. GREEN, Comptroller of the State of Florida, Defendants herein, and alleges:

1. The plaintiff, SUNSET REALTY CORP., is a Florida corporation with its principal place of business at Boca Grande, Lee County, Florida.

2. DAWSON MCDANIEL is the Tax Collector for Lee County, Florida, and HARRY SCHOOLEY is TAX ASSESSOR of Lee County, Florida; that GEORGE S. HUNTER, HERMAN J. HASTINGS, MACK H. JONES, J. FRED HUBER and JULIAN L. HUDSON are members of the Board of County Commissioners of Lee County, Florida and RAY E. GREEN, Defendant, is the Comptroller of the State of Florida.

3. Plaintiff, SUNSET REALTY CORP., is the fee simple owner of property situate in Lee County, Florida, more fully described in Exhibit "A" attached hereto and made a part hereof as if fully set out herein. The fair value of the land contained in Schedule A is $538,800.00 as shown on said schedule.

4. A preliminary tax assessment roll was prepared by HARRY SCHOOLEY, Tax Assessor, covering Lee County, Florida and specifically the property of Plaintiff set out in Exhibit "A". HARRY SCHOOLEY assessed the property of Plaintiff as set out in Exhibit "A" for tax purposes, at a total sum of $908,360.00 as shown in said Exhibit.

5. Chapter 193.25,1961, requires that the tax roll shall be complete prior to the first Monday in July, and that said Assessor shall meet with the Board of County Commissioners for the purpose of hearing complaints and filing of said roll on that date, but said HARRY SCHOOLEY, Defendant, failed to file the Lee County tax roll on the first Monday in July, to-wit, July 3, 1961, and the Board of Equalization failed to meet for the purpose of hearing complaints and receiving testimony thereon on that date, nor did they meet on said July 3, 1961, for the purpose of extending to the Assessor further time for the preparation of the tax roll, nor did he request further time for the preparation of the roll, nor did they meet on July 3, 1961 for the purpose of deferring hearings with respect thereto, as will be seen by the County Clerk's Certificate, Plaintiff's Exhibit "B", attached hereto and made a part hereof as if fully set out herein.

6. The Defendant Board of Commissioners, GEORGE S. HUNTER, HERMAN J. HASTINGS, MACK H. JONES, J. FRED HUBER, and JULIAN L. HUDSON, did meet on July 5, 1961, and allegedly sat as a Board of Equalization at which time the Plaintiff, SUNSET REALTY CORP., filed its objection to the assessments as shown on Schedule "A" hereof and to which, at a later hearing, said County Commissioners granted a token reduction, but did then and there fail to lawfully equalize the tax assessment of said Plaintiff.

7. Said Defendant Tax Assessor, is required by Article IX, Section 1, of the Florida Constitution, to

make a just valuation of all property in Lee County, and that said Defendant Tax Assessor, contrary to his duties and obligations under the law as aforesaid, assessed and determined the value of the above described property for ad valorem tax purposes unjustly and unfairly in that the said property was arbitrarily, grossly, and unlawfully overvalued because said assessment was based upon the speculative value of the property rather than based upon the just valuation thereof in accordance with the requirements of Article IX, Section 1, of the Florida Constitution.

8. Said Harry Schooley, Tax Assessor, contrary to his duty and obligation under the law as aforesaid, assessed, fixed and determined the value of the above-described property for ad valorem tax purposes, arbitrarily, unjustly, unfairly, and with unconscionable discrimination, in that the said property was grossly and unlawfully over-valued relatively and comparatively to property of the same class and kind similarly situated and utilized in said County.

9. Plaintiff's property is assessed by said Tax Assessor for the year 1961 at a value many times higher in proportion to its actual full cash value than the valuation placed by him on property generally in the County of the same class. The said assessed valuation was excessively high and grossly out of proportion to the assessed valuation fixed on property generally in said County.

10. The aforesaid appraisal of Harry Schooley, in the amount of $908,360.00 has been represented to be

the full cash value of the lands as of January 1, 1961. Said appraisal of Plaintiff's land is approximately ten (10) times the value of said lands as assessed against real estate by the Tax Assessor for Lee County, Florida, for the years 1959 and 1960. Said appraisal is grossly and unlawfully excessive as to Plaintiff's land as certain of said lands are mangrove, swamps, ponds and overflow land and that the assessment as made upon these lands is invalid for the reason that it is so grossly excessive and inequitable as to be confiscatory in its nature to amount to a fraud upon the Plaintiff, being in violation of Article IX, Section 1, of the Florida Constitution requiring a just valuation of all property.

11. Plaintiff would show that the Lee County Board of County Commissioners adopted the roll of tax assessor HARRY SCHOOLEY on the 2nd day of October, 1961.

12. That unless Defendants are restrained as hereinafter prayed, said illegal taxes will be declared and will constitute a lien against Plaintiff's property, causing Plaintiff irreparable damage.

13. Your Plaintiff files with this Complaint in the Registry of the Court, the sum of $16,396.76, which is the proper amount due, based upon the millage as set by the County Commissioners on said property upon the valuation of said lands as set forth by the Plaintiff herein.

WHEREFORE, Plaintiff prays:

1. That this Honorable Court take jurisdiction of the subject matter of this suit;

2. That this Court shall declare void and invalid the 1961 assessment of the Tax Assessor of Lee County in the amount of $908,360.00, upon Plaintiff's property;

3. That in the alternative, this Honorable Court shall set aside that part of the aforementioned assessment as shall be invalid or as shall appear to be contrary to law;

4. That this Court shall forthwith enjoin the Tax Collector of Lee County, Florida, from proceeding with the collection of the aforesaid tax assessed by the County Tax Assessor of Lee County, Florida, and shall further enjoin the said Tax Collector from issuing tax certificates or claiming or enforcing a lien upon the subject property on account of unpaid taxes for such assessment made by the Tax Assessor of Lee County, Florida;

5. That this Court shall decree any other and further relief which it deems equitable and proper.

Dated this 30th day of October A.D., 1961.

FARR AND FARR,
*Attorneys for Plaintiff,*
SUNSET REALTY CORP.,

By: EARL DRAYTON FARR JR.
Of Counsel
P. O. Box 635
Punta Gorda, Florida

*Appendix B*

STATE OF NEW YORK }
COUNTY OF NEW YORK }

Before me, the undersigned authority, personally appeared HENRY L. SCHWARTZ, known to me to be an officer of SUNSET REALTY CORP., Plaintiff in the above cause, who says that he has read the foregoing Complaint, and the facts and statements contained therein are true and correct.

HENRY L. SCHWARTZ
Title: *President*

Sworn to and subscribed before me this 25th day of October, A.D. 1961

S. HOYT SAYER
Notary Public—State of New York

My Commission Expires: 3/30/62

S. HOYT SAYER
Notary Public, State of New York
No. 60-8776900
Qualified in Westchester County
Term Expires March 30, 1962

(AFFIX NOTARY SEAL)

*Appendix B*

## EXHIBIT "A"

### SCHEDULE A

| (Description) | (Assessed Value) | (Full cash Value as appraised by Complainant) |
|---|---|---|
| Sec. 11, Township 43 South, Range 20 East, All Govt. Lot 2 and All Govt. Lot 4 N. of 20th St., Lee County, Florida | $353,790.00 | $190,000.00 |
| Sect. 2, Township 43 South, Range 20 East, Govt. Lots 1 to 5, inclusive | $480,020.00 | $315,000.00 |
| Lots 21 to 24, inclusive, and 28 to 31, inclusive, Block 43A, Boca Grande, Lee County, Florida | $ 36,900.00 | $ 20,800.00 |
| Lots 21 to 25, inclusive, Block 45, Boca Grande, Lee County, Florida | | $ 13,000.00 |
| All of Block 45, Boca Grande, Lee County, Florida | $ 37,650.00 | |
| | $908,360.00 | $538,800.00 |

*Appendix B*

## EXHIBIT "B"

### CERTIFICATE OF CLERK

I, D. T. Farabee, Clerk of the Circuit Court in and for Lee County, Florida, do hereby certify that the Lee County Board of County Commissioners did not convene as the Board of Tax Equilization on July 3, 1961 which was the first Monday in July, 1961.

D. T. FARABEE
D. T. Farabee
County Clerk of Lee County

*Appendix B*

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA.

IN CHANCERY

| | |
|---|---|
| SUNSET REALTY CORP., a Florida corporation, *Plaintiff,* *vs* HARRY SCHOOLEY, Tax Assessor of Lee County, Florida, et al., *Defendants.* | CASE No. 15340 |

## ASSIGNMENT OF ERRORS

The appellant Plaintiff assigns as the errors on which it intends to rely in the District Court of Appeal of Florida, Second District, for reversal of Final Decree appealed from the following:

1. The Court erred in making and entering its Final Decree bearing date the 21st day of June, 1963, entered in the above styled cause and recorded in Official Record Book 197, page 63.

2. The Court erred in entering a Final Decree in the above styled cause prior to the final determination in Chancery Case #14610 which would include an appeal therefrom as per the stipulation filed in this cause and Chancery Case #14610 is now on appeal and no

opinion has been rendered or mandate handed down to the lower Court in said cause.

3. The Court erred in ruling that the parties stipulated that the Plaintiff's lands were not assessed in excess of full cash value thereof and that the equities of said case #15340 are with the Defendants and against the Plaintiff.

4. The Court erred by failing to grant the Motions of Plaintiff, SUNSET REALTY CORP., a Florida corporation, to amend its Complaint to conform with the 1954 Florida Rules of Civil Procedure to show issues tried with the express or implied consent of the parties and treated in all respects as if the issue had been raised in the pleading as shown by the record, all without objections.

5. The Court erred in its failing to find arbitrary discrimination against the Plaintiff by the Defendant, HARRY SCHOOLEY, when he gave certain property owners a Subdividers' discount, which unlawful discount was one-half of the actual valuation of the developers' property as appraised by HARRY SCHOOLEY, which made the assessed valuation of the Plaintiff's property excessively high and grossly out of proportion to the assessed valuation fixed on the property given the developers' discount.

6. The Court erred in ruling the Plaintiff's lands were not assessed in excess of the full cash value thereof.

7. The Court erred in not declaring void and invalid the 1962 assessment of the Tax Assessor of Lee County, in the amount of $908,360.00 upon the Plaintiff's property, or that in the alternative set aside that part as shall be involved, or as appeared to be contrary to law.

8. That the Court erred in not requiring the Defendants, or any of them, to reassess the property of the Plaintiff in order to arrive at a full cash or just valuation of the Plaintiff's property for the 1962 assessment roll based on a percentage assessment on other lands in Lee County.

9. The Court erred in not requiring the Defendants, or any of them, to reassess the Plaintiff's property in order to equalize the valuation of the Plaintiff's property as compared to the property of the same class and kind similarly situated and utilized in said County.

10. The Court erred in holding that the equities were with the Defendant and against the Plaintiff because the Defendant Tax Assessor (HARRY SCHOOLEY) arbitrarily and capriciously selected Plaintiff's properties for increases of assessments and thereafter arbitrarily and capriciously assessed Plaintiff's properties without applying a uniform and equal rate of taxation on properties in Lee County, all in violation of the laws of Florida, the Florida Constitution and the Constitution of the United States.

11. The Court erred in holding that the equities were with the Defendant and against the Plaintiff be-

cause the Defendant Board of County Commissioners and the Defendant Comptroller of the State of Florida and the Defendant Tax Collector each made no revision and equalization as required by Florida law, the Florida constitution and the Constitution of the United States, although Plaintiff's properties had been arbitrarily and capriciously assessed without regard to equalization and uniformity with other assessments in said taxing district.

12. The Court erred in holding that the equities were with the Defendant and against the Plaintiff because the entire 1962 assessment roll made by the Defendant Tax Assessor (HARRY SCHOOLEY) was invalid and void as not prepared in accordance with Florida law, the Florida Constitution and the Constitution of the United States.

13. The Court erred in holding that the equities were with the Defendant and against the Plaintiff because the Court failed to provide the Plaintiff with an adequate remedy although the Defendants had caused Plaintiff to bear an excessive, discriminatory and disproportionate share of the tax burden and the Plaintiff has thereby been deprived of its property contrary to the laws of Florida, the Florida Constitution and the Constitution of the United States.

FARR, FARR AND HAYMANS

By: EARL DRAYTON FARR JR.
*Attorneys for Plaintiff*
P. O. Box 635
Punta Gorda, Florida

*Appendix B*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing assignment of errors has been furnished to FRANK A. PAVESE, Attorney-at-Law, P. O. Box 1187, Fort Myers, Florida; RICHARD W. SHAUGHNESSY, Attorney-at-Law, 2312 First Street, Fort Myers, Florida, and JOHN K. WOOLSLAIR, Attorney-at-Law, P. O. Box 509, Fort Myers, Florida, by U. S. Mail this 22nd day of August, 1963.

EARL DRAYTON FARR JR.
*Of Counsel*

*Appendix B*

IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
SECOND DISTRICT

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|---|---|
| SUNSET REALTY CORP., *Appellant,* vs DAWSON McDANIEL, Tax Collector of Lee County, Florida, et al., *Appellees.* | APPEAL No. 4371 Appeal from Circuit Court of Lee County, Florida. Hon. Archie M. Odom, Judge Presiding |

## PETITION FOR RE-HEARING

* * * * *

4. The affirmance of the decree by this Court is also in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of The United States.

The United States Supreme Court under this Amendment has clearly and explicitly held on a number of occasions that a taxpayer discriminated against is entitled to relief even though he is not assessed in excess of full cash value. In *Sioux City Bridge* v. *Dakota County*, 260 U. S. 441, the Court held:

> "And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property of the same class contravenes the constitutional right of one taxed on the full value of his property."

Chief Justice Hughes stated the same rule of law in *Cumberland Coal Co.* v. *Board*, 284 U. S. 23. These

cases were followed in *Atchinson Etc. Ry. Co.* v. *U. S.*, 284 U. S. 248 and in *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620. The last cited *Hillsborough* case held that a state was constitutionally required to provide effective relief to any taxpayer who is discriminated against. The Court there states:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. *He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class.*" (Emphasis added.)

The evidence upon the trial showed plaintiff to be a victim of a discriminatory assessment, and the refusal of the Circuit Court to grant him effective relief was a violation of his Federal Constitutional Rights.

* * * * *

Respectfully submitted,

FARR, FARR AND HAYMANS

By EARL DRAYTON FARR, JR.
*Of Counsel for Appellant*
P. O. Box 635
Punta Gorda, Florida.

*Appendix B*

## IN THE SUPREME COURT OF FLORIDA

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|---|---|
| SUNSET REALTY CORP., a Florida Corporation, *Petitioner,* *vs.* DAWSON MCDANIEL, Tax Collector of Lee County, Fla.; HARRY SCHOOLEY, Tax Assessor of Lee County, Florida; GEORGE S. HUNTER, HERMAN J. HASTINGS, MACK H. JONES, J. FRED HUBER, JULIAN L. HUDSON, as members of the Board of County Commissioners of Lee County, Florida; and RAY E. GREEN, Comptroller of the State of Florida. *Respondents.* | No. 33,630 |

## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA. SECOND DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioner, SUNSET REALTY CORP., a Florida corporation, presents this its Petition for Writ of Certiorari and states:

* * * * *

5. On the foregoing facts the District Court of Appeal Second District was presented with the following point of law:

WHETHER A SUIT FOR AN INJUNCTION AGAINST A TAX ASSESSMENT OR COLLECTION IS AVAILABLE TO A

*Appendix B*

PROPERTY OWNER WHO CONTESTS THE TAX ASSESSMENT ON THE GROUNDS THAT IT IS DISCRIMINATORY AND UNJUST, SINCE OTHER PROPERTY OWNERS OF THE SAME CLASS WERE ARBITRARILY ASSESSED AT A LOWER PERCENTAGE OF FULL CASH VALUE.

On this point of law, the District Court of Appeal, Second District ruled that such an issue can only be raised by a mandamus action or other proceeding against the taxing authorities.

6. The same point of law was involved in

(a) The case of *Graham* v. *City of West Tampa*, 71 Fla. 605, 71 So. 926 (1916), where the facts were that the plaintiff filed a bill in equity to enjoin the collection of a tax, alleging among other things the failure of the defendant to assess and collect taxes on other properties owned by other taxpayers and contending that the principles of uniformity and equality of taxation made the assessed valuation on the plaintiff's land unjust, excessive and discriminatory. The Trial Court sustained a demurrer to the bill. This court reversed, stating: (71 So. at 928)

> "* * * * [I]f * * * * valuations are shown to be essentially unjust or unequal abstractly or relatively, the assessment is invalid. Valuations of property for taxation must be ascertained in the manner required by law and must have relation to the actual value of the property; and there must be no substantial inequality in valuations.
>
> Where the essential requirements of law are not observed in making valuations of property for assessment, and the valuations as made are

shown by admissions or proofs to be clearly excessive, unjust and unequal, appropriate relief may be had in equity. * * * *"

(b) The case of *Roberts* v. *American Nat. Bank,* 94 Fla. 427, 115 So. 261 (1927) where the facts were that the plaintiff, a national banking association, sued to enjoin the tax collector of Escambia County from levying a tax upon the shares of its stockholders, charging that the tax was discriminatory and that other competitive forms of capital were not taxed and had not been assessed for taxation, and that therefore the assessment against the plaintiff's capital stock was so arbitrary and discriminating as to amount to fraud and render the tax invalid and void. The trial court overruled a demurrer and granted the plaintiff a temporary injunction. The court affirmed, stating: (115 So. at 264, 266)

"* * * * When the inequality of valuation is a result of a statute of a state designed to discriminate injuriously against any class of persons or any specie of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief.' "

"The allegations of this part of the bill are sufficient to support proof of an intentional and deliberate failure of the tax assessor to observe and comply with the mandatory requirements

of the law designed to guard against unjust discriminatory taxation and the imposition of a disproportionate share of the public burden on those whose property may have been assessed for taxation and, therefore, are sufficient to sustain the action of the judge of the circuit court in granting the temporary restraining order from which this appeal is taken."

(c) The case of *Folsom* v. *Bank of Greenwood,* 97 Fla. 425, 120 So. 317 (1929) where the facts were that the plaintiff by an equity injunction suit claimed that there had been unlawful discrimination in the assessment of its capital stock, surplus and undivided profits, when large amounts of other like property subject to the tax were not assessed at all. A decree was entered for the plaintiff. This court affirmed, stating (120 So. at 318-319):

"This appeal is from a decree adjudicating a tax assessment upon the bank stock, surplus, and undivided profits of a state bank, to be invalid, and enjoining the sale of the property for the tax, the ground being that large volumes of other like property subject to the tax were not assessed at all. Injunction is a proper remedy.

* * * * *

Where under the controlling law a particular class of property is subject to taxation and the property of that class owned by some persons is assessed for the tax, while large amounts of property of the same class owned by other persons and subject to the tax, are by the assessing officers systematically, intentionally, and purposely omitted from the assessment rolls, or so assessed at a lower rate or at a relatively lower valuation ac-

cording to real values, it operates as a denial of the equal protection of the laws in violation of the Federal and State organic provisions, and may be judicially remedied by enjoining the collection of the entire tax on the property that is assessed or that is assessed at a higher rate or valuation, where as a matter of law the failure to assess all the property subject to the tax or an assessment of some at a higher rate or valuation than others renders the entire assessment illegal as to the property that is assessed. * * * * But where the legality is only as to an ascertainable excess, the injunctive relief should be confined to the excess assessment. * * * *"

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*Appendix B*

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT.

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| SUNSET REALTY CORP., a Florida corporation, *Appellant,* *vs.* DAWSON McDANIEL, Tax Collector of Lee County, Florida, et al., *Appellees.* | CASE No. 4371 |

## ASSIGNMENT OF ERRORS

COMES NOW the Appellant-Plaintiff, SUNSET REALTY CORP., a Florida corporation, by and through its undersigned attorneys, and, pursuant to Florida Appellate Rule 3.5, assigns as the errors upon which it will rely in the appeal of this cause to the Supreme Court of Florida the following:

1) The District Court erred in making and entering its opinion and decision, bearing date and filed in the records of that Court on June 10, 1964.

2) The District Court erred in initially construing a controlling provision of the Constitution of the State of Florida, to-wit: Article IX, Section 1, thereof, so as to deny the Appellant-Plaintiff injunctive relief against a discriminatory, arbitrary and unjust tax assessment.

3) The District Court erred in initially construing a controlling provision of the Constitution of the United States, to-wit: the 14th Amendment thereof, so as to deny the Appellant-Plaintiff injunctive relief against a discriminatory, arbitrary and unjust assessment.

4) The District Court erred in initially construing the Constitutions of the State of Florida and the United States so as to require the Appellant-Plaintiff to file a mandamus action to raise the assessment on comparable properties in the taxing district, rather than grant the Appellant-Plaintiff injunctive relief against an assessment which was discriminatory as to it when compared to other property of the same class.

5) The District Court erred in affirming the refusal of the Circuit Court to grant the motion of Appellant-Plaintiff to amend its complaint to show issues tried with the express or implied consent of the parties, and treated in all respects by the parties as if the issue had been raised in the pleadings.

6) The District Court erred in affirming the Circuit Court's failure to find arbitrary discrimination against the Appellant-Plaintiff by the Appellee-Defendant HARRY SCHOOLEY when he gave certain property owners a sub-divider's discount, which unlawful discount was one-half (½) of the actual valuation of the developer's property as appraised by HARRY SCHOOLEY, which made the assessed valuation of the Appellant-Plaintiff's property excessively high and

grossly out of proportion to the assessed valuation fixed on the property given the developer's discount.

7) The District Court erred in affirming the Circuit Court's decree that the Appellant-Plaintiff's lands were not assessed in excess of the full cash value thereof.

8) The District Court erred in affirming the Circuit Court's refusal to declare void and invalid the 1961 assessment of the Tax Assessor of Lee County, Florida, in the amount of Nine Hundred Eight Thousand Three Hundred Sixty ($908,360.00) Dollars, upon the Appellant-Plaintiff's property; or to, in the alternative, set aside the part thereof as was contrary to law.

9) The District Court erred in affirming the Circuit Court's refusal to require the Appellees, or any of them, to reassess the property of the Appellant-Plaintiff in order to arrive at a full cash or just valuation of the Appellant-Plaintiff's property for the 1961 assessment roll based on a percentage assessment on other lands in Lee County, Florida.

10) The District Court erred in affirming the refusal of the Circuit Court to require the Appellees, or any of them, to reassess the Appellant-Plaintiff's property in order to equalize the valuation of the Appellant's property as compared to the property of the same class and kind similarly situated and utilized in said county.

11) The District Court erred in affirming the Circuit Court's holding that the equities were with the Appellees and against the Appellant, because the Appellee Tax Assessor HARRY SCHOOLEY arbitrarily and capriciously selected and assessed Appellant's property without applying a uniform and equal rate of taxation on properties in Lee County, in violation of the Statutes of Florida, the Florida Constitution, and the Constitution of the United States.

12) The District Court erred in affirming the holding of the Circuit Court that the equities were with the Appellees and against the Appellant, because the Appellee Board of County Commissioners and the Appellee Comptroller of the State of Florida and the Appellee Tax Collector each made no revision and equalization as required by the Florida Statutes and Constitution and the Constitution of the United States, although Appellant's properties had been arbitrarily and capriciously assessed without regard to equalization and uniformity with other assessments in said taxing district.

13) The District Court erred in affirming the holding of the Circuit Court that the equities were with the Appellees and against the Appellant, because the entire 1961 assessment roll made by the Appellee Tax Assessor, HARRY SCHOOLEY, was invalid, void, and not prepared in accordance with the Florida Statutes or Constitution, and the Constitution of the United States.

14) The District Court erred in affirming the Circuit Court's holding that the equities were with the Appellees and against the Appellant, because the Circuit Court failed to provide the Appellant with an adequate remedy, although the Appellees had caused Appellant to bear an excessive, discriminatory and disproportionate share of the tax burden, and the Appellant has thereby been deprived of its property, contrary to the Florida Statutes, the Florida Constitution, and the Constitution of the United States.

CODY FOWLER
Cody Fowler

MARVIN E. BARKIN
Marvin E. Barkin

Of Counsel:

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& TRENAM
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FARR, FARR AND HAYMANS
Post Office Box 635
Punta Gorda, Florida

Attorneys for Appellant-Plaintiff,
SUNSET REALTY CORP., a Florida corporation

*Appendix B*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Assignment of Errors has been furnished to Mr. R. W. Shaughnessy, Attorney for Appellee Harry Schooley, Tax Assessor, P. O. Box 582, Fort Myers, Florida; Mr. Frank A. Pavese, Attorney for Appellee Board of County Commissioners, P. O. Box 1187, Fort Myers, Florida; and Mr. John K. Woolslair, of Sheppard & Woolslair, Attorney for Appellee Dawson McDaniel, Tax Collector, P. O. Box 509, Fort Myers, Florida, by United States Mail, this 27th day of August, 1964.

MARVIN E. BARKIN
*Attorney*

*Appendix B*

IN THE SUPREME COURT OF FLORIDA

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| SUNSET REALTY CORP., a Florida corporation, *Petitioner,* *vs* DAWSON MCDANIEL, Tax Collector of Lee County, Florida, et al, *Respondents.* | CASE No. 33,630 |

## PETITION FOR REHEARING

The Petitioner, SUNSET REALTY CORP., a Florida corporation, by and through its undersigned attorneys, pursuant to Rule 3.14, Florida Appellate Rules, respectfully petitions the Court for a rehearing and reconsideration of this Court's Order of October 30, 1964, denying its Petition for a Writ of Certiorari filed herein. As reasons therefor the Petitioner states:

1. The Court overlooked or failed to consider that the District Court's decision necessarily and expressly determined that the only form of relief in this state available to a taxpayer whose property is being arbitrarily assessed at a higher percentage of full cash value than other taxpayers in the same class, but not at more than full cash value, is by mandamus to increase the assessment level of other taxpayers. This decision squarely conflicts with this Court's prior de-

cisions that establish that a taxpayer may sue to enjoin a tax assessment under such circumstances, and this Court therefore has "conflict jurisdiction" to entertain the Petition for Writ of Certiorari and resolve the conflicting decisions. See *Graham* v. *City of West Tampa,* 71 Fla. 605, 71 So. 926 (1916); *Roberts* v. *American Nat. Bank,* 94 Fla. 427, 115 So. 261 (1927); *Folsom* v. *Bank of Greenwood,* 97 Fla. 426, 120 So. 317 (1929).

2. The Court overlooked or failed to consider that a taxpayer under the 14th Amendment to the United States Constitution and Article IX, Section 1, of the Florida Constitution is entitled to maintain an injunction action against a discriminatory and unjust assessment and cannot be relegated to the indirect remedy of mandamus to require the raising of the assessment level of other taxpayers. In *Louisville & N. R. Co.* v. *Amos,* 98 Fla. 350, 123 So. 745, 747 (1929), this Court stated:

> "It is also well settled that a taxpayer, although assessed on a basis of not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class of other taxpayers."

See also, to the same effect, *Coombs* v. *City of Coral Gables,* 124 Fla. 374, 168 So. 524 (1936); *cf., Franks* v. *Davis,* Fla. 1962, 145 So. 2d 228, 230-231.

And the United States Supreme Court has consistently held that the equal protection clause of the

14th Amendment entitles a taxpayer to protest discriminatory treatment and that the constitutional requirement "is not satisfied if a state does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class." *Hillsborough TP.* v. *Cromwell*, 326 U. S. 620, 623, 66 S. Ct. 445, 448, 90 L. Ed. 358 (1946). See also *Sioux City Bridge* v. *Dakota County*, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923).

3. The Court overlooked or failed to consider the fact that the Respondent Tax Assessor SCHOOLEY, by his own testimony and admissions, established that he was granting a 50% discount in assessed valuation to owners of subdivisions whenever 60% of the lots had not been sold, in direct violation of Section 192.31, Florida Statutes, which directs that if 60% of such lands have not been sold such lands are to be taxed for tax assessment purposes on the same basis as unplatted acreage of a similar character. Since the Petitioner's land is unplatted, by the Respondent's own testimony the Petitioner was discriminated against. In addition to this discriminatory "developer's discount", unauthorized by law, the Tax Assessor further admitted that he was giving a 10% discount on all improvements on property which, although allegedly based on storm damage (Hurricane "Donna"), in fact had nothing to do with whether the improvements had even been built prior to that storm. This case therefore presents a situation in which the Tax Assessor

admittedly discriminated; and, nevertheless, the District Court affirmed the Circuit Court's determination that the Plaintiff had no right by injunctive relief to seek a reduction of his taxes to the same level as that of other property holders of the same class.

WHEREFORE, Petitioner prays that a rehearing be granted and that thereupon this Court's decision of October 30, 1964 be receded from; that certiorari be granted herein; and that this case be reversed and remanded for such further proceedings as may be consistent with law.

Respectfully submitted,

CODY FOWLER
Cody Fowler

MARVIN E. BARKIN
Marvin E. Barkin

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*Attorneys for Petitioner*

*Appendix B*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Rehearing has been furnished, by regular mail, to Mr. R. W. Shaughnessy, Attorney for Appellee Harry Schooley, Tax Assessor, P. O. Box 582, Fort Myers, Florida; M. Frank A. Pavese, Attorney for Appellee Board of County Commissioners, P. O. Box 1187, Fort Myers, Florida; and Mr. John K. Woolslair, of Sheppard & Woolslair, Attorney for Appellee Dawson McDaniel, Tax Collector, P. O. Box 509, Fort Myers, Florida, this 10th day of November, 1964.

MARVIN E. BARKIN
*Attorney*

## Appendix C

IN THE
CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA
IN CHANCERY

| | |
|---|---|
| SUNSET REALTY CORP., a Florida corporation<br>*Plaintiff,*<br>*—vs—*<br>DAWSON MCDANIEL, Tax Collector of Lee County, Florida; HARRY SCHOOLEY, Tax Assessor of Lee County, Florida; GEORGE S. HUNTER, HERMAN J. HASTINGS, MACK H. JONES, J. FRED HUBER, JULIAN L. HUDSON, as members of the Board of County Commissioners of Lee County, Florida; and RAY E. GREEN, Comptroller of the State of Florida,<br>*Defendants.* | Case No. #14610 |

Motion to Amend the Complaint to Conform With the Evidence

Comes now the Plaintiff, SUNSET REALTY CORP., a Florida corporation, by and through its undersigned Attorneys and files this it's Motion To Amend it's Complaint to Conform with the evidence under Rule 1.15, 1954 Rules of Civil Procedure; to show issues tried with the express or implied consent of the parties and

treated in all respects as if the issue had been raised in the pleadings as shown by the record all without objection. Plaintiff would show the Amendment, to-wit:

Defendant, HARRY SCHOOLEY did give certain property owners, subdividers, a "developer's discount", which unlawful discount was one-half of the actual valuation of the developer's property which made the assessed valuation of the Plantiff's property excessively high and grossly out of proportion to the assessed valuation fixed on the property given the developer's discount.

FARR, FARR AND HAYMANS

By EARL DRAYTON FARR
Of Counsel for Plaintiff
P. O. Box 635
Punta Gorda, Florida.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing MOTION TO AMEND THE COMPLAINT TO CONFORM WITH THE EVIDENCE has been furnished Frank A. Pavese, Attorney-at-Law, P. O. Box 1187, Fort Myers, Florida, Richard W. Shaughnessy, Attorney-at-Law, 2312 First Street, Fort Myers, Florida, and John K. Woolslair, Attorney-at-Law, P. O. Box 509, Fort Myers, Florida, by United States Mail this 18 day of June, 1963.

EARL DRAYTON FARR
Of Counsel

*Appendix C*

IN THE
CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA
IN CHANCERY

| | |
|---|---|
| SUNSET REALTY CORP., a Florida Corporation, *Plaintiff*, *vs.* DAWSON MCDANIEL, Tax Collector of Lee County, Florida, et al., *Defendants.* | Case No. 14610 |

## ORDER

The Motion of Plaintiff to amend the Complaint to conform with the evidence, coming on to be heard, all parties being represented by counsel and the Court after hearing the respective arguments, finds that:

1. To grant said Motion would change the entire style of the case and call for a different type of action than the suit originally filed whether by mandamus or other proceedings;

2. To grant said Motion would test the Tax Assessor's authority to assess developing subdivisions at a developer's discount on acreage basis, thereby placing the entire tax rolls of Lee County, Florida for the years 1961 and 1962 in question as to the validity thereof (1962

taxes to be included by stipulation from Chancery Case No. 15340, Lee County, Florida);

3. Testimony and exhibits introduced at the trial of the cause of action failed to show that plaintiff's lands were assessed in excess of one hundred per cent of full cash value thereof;

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Motion of the Plaintiff to amend the Complaint to conform with the evidence is hereby denied.

DONE AND ORDERED in Chambers, at Fort Myers, Florida, this 21st day of June, 1963.

ARCHIE M. ODOM
*Circuit Judge*

## Appendix D

COSEN INV. CO., Inc., v. OVERSTREET, Tax Collector, et al.

Supreme Court of Florida, en Banc.
May 9, 1944.

Taxation—608(5)

Since the adoption of constitutional amendment exempting homestead to the extent of $5,000 from taxation, it is necessary to assess all property at 100 per cent of its true cash value as required by Constitution to render tax burden uniform and equal, and taxpayer could not enjoin collection of portion of assessment against his property on ground that it had been assessed at 100 per cent of its value, and other nearby property had been assessed at approximately 75 per cent of its value. F.S.A. § 193.11; F.S.A.Const. art. 10, § 7.

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Appeal from Circuit Court, Dade County; George E. Holt, Judge.

Action by Cosen Investment Company, Inc., against H. E. Overstreet, as Tax Collector, Dade County, and another, to enjoin the collection of a portion of taxes assessed against plaintiff's property. From a decree dismissing the bill, plaintiff appeals.

Affirmed.

Marshall F. Sanders, of Miami, for appellant.

Ward & Ward, of Miami, for appellee Van C. Kussrow.

Melbourne L. Martin, of Miami, for appellee H. E. Overstreet.

ADAMS, Justice.

Appellant filed a bill against the Tax Collector of Dade County to enjoin the collection of a portion of the taxes assessed against its property upon the ground that its property had been assessed at its approximate cash value whereas other nearby property had been assessed at approximately seventy-five per cent of its cash value. From a decree dismissing the bill an appeal is taken. Appellant relies upon our opinion, Camp Phosphate Co. v. Allen, 77 Fla. 341, 81 So. 503. This case does not support appellant because, as was pointed out there, the purpose of the law was to render the tax burden uniform, equal and just and if all property was assessed at fifty per cent of its cash value the purpose of the law was carried out. Such logic is not now tenable because, by the adoption of Art. X, Sec. 7, to the Florida Constitution, homesteads to the extent of $5,000 are exempt from taxation.

To perpetuate the practice of assessing all property at a less percentage than that directed by the statute (Chap. 20722, Acts 1941, F.S.A. § 193.11) would necessarily result in favoring the homesteads. The logic of the opinion in Camp Phosphate Co. v. Allen, supra, is no longer applicable because the reduced value, even though uniformly lower, is no longer just. Subsequent to the adoption of Art. X, Sec. 7, the practice of assessing property has been in conformity with the statute, that is, at one hundred per cent of its true cash value.

To grant appellant's request would require us to order a constitutional, official act contrary to the statute and by so doing the effect of his act would result in rendering unequal the tax burden to the taxpayers of Dade County.

The decree is affirmed.

BUFORD, C. J., and TERRELL and BROWN, JJ., concur.

CHAPMAN and THOMAS, JJ., agree to conclusion.

SEBRING, J., concurs in conclusion.

*Appendix D*

Stetson O. Sproul, as Tax Collector of Palm Beach County, Florida, and Ray E. Green, as Comptroller of the State of Florida, Appellants,

v.

Royal Palm Yacht & County Club, Inc., a Florida corporation, Appellee.

No. 3111.

District Court of Appeal of Florida.
Second District.
Aug. 17, 1962.

Suit to enjoin collection of real estate taxes. The Circuit Court, Palm Beach County, James R. Knott, J., denied a motion to dismiss, and defendants appealed. The District Court of Appeal, Shannon, C. J., held that taxpayer was not entitled to enjoin collection of real estate taxes, on ground of illegality of assessment, without alleging that his property was assessed in excess of full cash value.

Reversed and remanded with direction.

Taxation—611(5)

Taxpayer was not entitled to enjoin collection of real estate taxes, on ground of illegality of assessment, without alleging that his property was assessed in excess of full cash value.

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Harry A. Johnston and Henry F. Lilienthal, West Palm Beach, for appellants.

B. F. Paty of Paty, Downey & Lewis, West Palm Beach, for appellee.

SHANNON, Chief Judge.

The plaintiff-appellee, a property owner, filed suit to enjoin the tax collector of Palm Beach County from collecting taxes assessed against its real property, alleging an illegal assessment.

In its complaint the plaintiff alleged that several other pieces of property in the county similar to its property were assessed at a much lower valuation but nowhere in its complaint has the plaintiff alleged that its property is assessed in excess of its actual full cash value. The defendants filed a motion to dismiss the complaint but the court below denied the same, and hence this appeal.

The particular point presented in this interlocutory appeal is whether or not the complaint states a cause of action for injunctive relief in a challenge to the real estate assessment of the county tax assessor when it fails to allege that such assessment is in excess of the actual full cash value of the property.

The appellants have cited one case in support of their position, Cosen Inv. Co., Inc. v. Overstreet, 1944, 154 Fla. 416, 17 So.2d 788, wherein the Supreme Court affirmed the Circuit Court of Dade County in dismissing such a complaint. The Court, in the Cosen case, stated

> "To perpetuate the practice of assessing all property at a less percentage than that directed by the statute (Chap. 20722, Acts 1941, F.S.A. § 193.-11) would necessarily result in favoring the home-

steads. The logic of the opinion in Camp Phosphate Co. v. Allen, [77 Fla. 341, 81 So. 503,] supra, is no longer applicable because the reduced value, even though uniformly lower, is no longer just. Subsequent to the adoption of Art. X, Sec. 7, the practice of assessing property has been in conformity with the statute, that is at one hundred per cent of its true cash value.

"To grant appellant's request would require us to order a constitutional official act contrary to the statute and by so doing the effect of his act would result in rendering unequal the tax burden to the taxpayers of Dade County."

In the case of Florida Land Co. v. Graham, 1929, 97 Fla. 476, 121 So. 462, the Supreme Court affirmed an order dissolving a temporary injunction, saying:

"* * * The bill does not allege that the lands were assessed higher than their actual value, or at a higher valuation than were the lands of like character and like situation assessed."

The appellee has cited Harbond, Inc., v. Anderson, Fla.App.1961, 134 So.2d 816; and Dade County v. Dupont Plaza, Inc., Fla.App.1960, 117 So.2d 849. In both of these cases, however, there was the allegation in the complaint that the assessment was at or more than the actual full cash value of the property involved.

The order of the lower court is reversed and the cause is remanded with direction for the entry of an order dismissing the complaint filed in this case.

ALLEN and SMITH, JJ., concur.